

rights as provided by Montana law.

- c. The water appropriated pursuant to this Permit shall only be diverted during extremely high spring runoff or when the Water and Power Resources Service (Bureau of Reclamation) is spilling at Vandalia Diversion Dam. During all other periods the Permittee shall allow the normal flow to pass her diversion to satisfy prior water rights.
- d. The Permittee shall contact the Water and Power Resources Service (Bureau of Reclamation) at Malta at the start of each irrigation season to determine the current water supply conditions and the availability of water for her use. This contact shall be made by certified mail through the U.S. Postal Service with return receipt requested.
- e. The conditions contained herein relating to the Vandalia Diversion Dam under "c" and "d" above may be modified by the Department upon receipt of further evidence or determination by the Department pertaining to water rights of the U.S. Government and said reservoir.
- f. The Permittee shall install and maintain an adequate measuring device to enable the Permittee to keep a record of rate and volume of water diverted as well as the periods of diversion. Such records shall be presented to the Department of Natural Resources and Conservation upon demand by the Department.
- g. The Permittee shall contact the U. S. Department of Interior, Geological Survey Gauging Station at the International Boundary (398-5532) before diverting any water under this Permit. The Permittee shall

1 not divert any water unless the flow in Lodge Creek
2 at the gauging station exceeds 225 cubic feet per
3 second. The Permittee shall keep a written record
4 of flows in Lodge Creek whenever water is appropriated
5 under this Permit, and said records shall be made
6 available to the Department upon request.

7 3. The granting of Provisional Permit No. 18,518-s40J by the
8 Department in no way reduces or alters the Permittee's liability for
9 damage caused by the Permittee's exercise of said Permit, nor does the
10 Department in issuing the Permit acknowledge liability for damage caused
11 by the Permittee's exercise of this Permit.

12 4. The granting of this Provisional Permit in no way grants the
13 Permittee any right to violate rights of any other party nor does it
14 excuse the Permittee from any liability for same even if such violation
15 is a necessary and unavoidable consequence of exercising this Permit.

16 NOTICE

17 The Final Order in this matter will be sent to all parties by
18 certified mail.

19 The Hearing Examiner's Final Order may be appealed in accordance
20 with the Montana Administrative Procedures Act, by filing a petition in
21 the appropriate court within thirty (30) days after service of the Final
22 Order.

23 No water shall be appropriated under this Final Order until Provisional
24 Permit No. 18,518-s40J is issued.

25 DATED this 6th day of March, 1980.

26
27 David L. Pengelly
28 DAVID L. PENGELLY, D.N.R.&C.
HEARING EXAMINER

CASE # 18518

1 BEFORE THE DEPARTMENT
2 OF
3 NATURAL RESOURCES AND CONSERVATION
 OF THE STATE OF MONTANA

4 * * * * *
5 IN THE MATTER OF APPLICATION)
6 FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
 NO. 18,518-s40J BY DOROTHY WORONIK)
 * * * * *

7 Pursuant to the Montana Water Use Act and the Montana Administrative
8 Procedures Act, after due notice, a hearing was held on November 13,
9 1979, at Havre, Montana, for the purpose of hearing objections to the
10 above named Application for Beneficial Water Use Permit No. 18,518-s40J,
11 David L. Pengelly, Hearing Examiner, presiding. Application Nos. 18,516-
12 s40J and 18,519-s40J were considered concurrently with the above Application.

13 The Applicant, Dorothy Woronik, appeared at the hearing and presented
14 testimony in support of the Application. Mrs. Woronik was represented
15 by legal counsel, Waldo Spangelo and Jim Spangelo, Havre, Montana. Two
16 exhibits were introduced supporting the Application, to wit:

17 APPLICANT'S EXHIBITS:

18 A-1 U.S.G.S. streamflow records for Lodge Creek below McRae Creek
19 at the International Boundary, 1951 to 1978; and Lodge Creek
20 at International Boundary, 1910 to 1951

21 A-2 Summary of U.S.G.S. streamflow records for Lodge Creek at
22 International Boundary from 1965 to 1978

23 The Applicant's Exhibits were marked accordingly and received into the
24 record without objection.

25 Also appearing at the hearing and testifying in support of the
26 Application was Junior Woronik, the Applicant's son.
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1 One Objector attended the hearing and presented testimony or
2 statements. The Objector, Frank Pleskac, was represented by legal
3 counsel, Ted Thompson and Bruce Swenson, Havre, Montana. The Objector
4 introduced twelve (12) exhibits supporting his objection, to wit:

5 OBJECTOR'S EXHIBITS:

- 6 O-1 Photograph of Frank Pleskac's intake pipe in Lodge Creek
7 O-2 Photograph of Frank Pleskac's pumping site on Lodge Creek
8 O-3 Photograph of Lodge Creek, approximately 1/4 mile below
9 Frank Pleskac's pump site
10 O-4 Photograph of Frank Pleskac's intake pipe on Lodge Creek
11 O-5 Photograph of Frank Pleskac's sprinkler system
12 O-6 Photograph of Frank Pleskac's pump
13 O-7 Photograph of Frank Pleskac's flow meter on pump
14 O-8 Bar graph of average monthly stream flows for Lodge Creek at
15 U.S.G.S. gauge below McRae Creek at International Boundary,
16 1961 to 1977
17 O-9 Bar graph of maximum recorded daily flow each month during
18 irrigation season at U.S.G.S. gauging station on Lodge Creek
19 below McRae Creek at International Boundary
20 O-10 Map of Applicant's proposed diversion and Objector Pleskac's
21 existing diversion on a 1:250,000 scale map, Havre, Montana
22 O-11 Copies of water right appropriations from Hill County Clerk
23 and Recorder files
24 O-12 Copies of water right appropriations from Blaine County Clerk
25 and Recorder files.

26 The Objector's Exhibits O-1 thru O-10 were marked accordingly and
27 received into the record without objections. Counsel for the Applicant
28 objected to Exhibits O-11 and O-12 based on the apparent irrelevancy of

1 the Exhibits and also because the chain of title for each water right
2 would need to be traced to determine if the rights were still valid.

3 Montana Department of Natural Resources and Conservation personnel
4 present and testifying on behalf of the Department were Arlin Krogstad,
5 Hearing Representative and Bob Larson, Havre Water Right Bureau Field
6 Office Manager. Also present was Vicki Woodrow, Hearing Recorder. The
7 Department was not represented by legal counsel. No exhibits were
8 introduced by the Department.

9
10 MOTIONS

11 1. On June 19, 1979, the Department received a motion from Counsel
12 for the Objector to dismiss the above Application on the grounds that
13 the Applicant failed to present any evidence or proof that there are
14 unappropriated waters in the source of supply, at times when the water
15 can be put to use by the Applicant, in the amount which the Applicant
16 seeks to appropriate, and throughout the period when the Applicant seeks
17 to appropriate said waters; that the rights of prior appropriators will
18 not be adversely affected; or that the proposed means of diversion or
19 construction are adequate.

20 2. At the hearing on November 13, 1979, Counsel for the Applicant
21 presented a motion to strike the motion to dismiss presented by Counsel
22 for the Objector.

23 3. At the hearing, Counsel for the Objector introduced a motion
24 challenging the dismissal of criteria number six (6) of the Montana
25 Water Use Act (85-2-311 (6), MCA, 1979) from being considered in this
26 case. Criteria number six (6) states that "an applicant for an appropriation
27 of 15 cubic feet per second or more proves by clear and convincing
28 evidence that the rights of a prior appropriator will not be adversely
affected."

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1 The Applicant has three (3) applications for beneficial water use
2 pending before the Department; Nos. 18,516-s40J and 18,519-s40J are for
3 11 cubic feet per second each, and No. 18,518-s40J is for 300 gallons
4 per minute. Together, these three (3) applications exceed 15 cubic feet
5 per second, however, the Applicant has stated that the same pump will be
6 used to exercise the two (2) applications for 11 cubic feet per second.
7 Therefore, it is concluded that the maximum amount of water that may be
8 diverted at any time is less than 15 cubic feet per second; thus, criteria
9 number six (6) shall not be considered in this matter.

10 Both motions presented by the Objector are hereby denied. The
11 motion presented by the Applicant is hereby accepted.

12
13 SUMMARY OF RECORD

14 1. On May 3, 1978, the Department received Application for Beneficial
15 Water Use Permit No. 18,518-s40J by Dorothy Woronik to appropriate 300
16 gallons per minute of water, not to exceed 28 acre-feet per annum from
17 Lodge Creek, a tributary of the Milk River, Hill County, Montana, to be
18 diverted by means of a pump at points in the NW1/4 NW1/4 NW1/4 of Section
19 21 and in the NE1/4 NE1/4 NE1/4 of Section 20, and to be used for new
20 flood irrigation on 14 acres in the NW1/4 of Section 21 and 5 acres in the
21 NE1/4 of Section 20, all in Township 37 North, Range 16 East, M.P.M., and
22 containing a total of 19 acres, more or less, from February 1 to May 30,
23 inclusive, of each year.

24 2. On October 25, November 1, and November 8, 1978, the Department
25 caused to be duly published in the Havre Daily News, Havre, Montana,
26 notice of the above Application for Beneficial Water Use Permit No. 18,518-
27 s40J.

28 3. On November 9, 1978, the Department received an objection to
the above Application from the North Chinook Irrigation Association.

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1 4. On November 17, 1978, the Department received objections to the
2 above Application from the Malta Irrigation District and the Glasgow
3 Irrigation District.

4 5. On November 24, 1978, the Department received an objection to
5 the above Application from the Water and Power Resources Service (formerly
6 the Bureau of Reclamation).

7 6. On December 8, 1978, the Department received an objection to
8 the above Application from Frank Pleskac.

9 7. In a letter received by the Department on November 14, 1978,
10 the Water and Power Resources Services stated that they would not attend
11 the hearing assuming that the standard Milk River conditions would be
12 included in any provisional permits granted. The Applicant has agreed
13 to the standard Milk River conditions as being part of the provisional
14 permit if granted.

15 8. The Applicant, Dorothy Woronik, testified that she filed the
16 above Application with the assistance of Bob Larson. The Applicant runs
17 350 to 400 head of cattle. In the past the Applicant has had to buy hay
18 to feed her cattle, and because of the price of the hay, wishes to grow
19 her own hay crop. The Applicant feels that growing her own hay crop is
20 economically feasible, since she already owns the equipment necessary to
21 set up the irrigation system described in the above Application.

22 9. Junior Woronik, the Applicant's son, testified that the Applicant
23 currently raises 400 acres of alfalfa, including alfalfa raised on
24 leased land. The Applicant intends to divert water only when the stream
25 banks are overflowing. The water is to be ponded for 12 to 14 days upon
26 the Applicant's field while the ground is frozen. At the end of this
27 period, the excess water will be returned to the stream. The Applicant's
28 pump stations are located on the west side of Lodge Creek, while the

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1 Applicant lives on the east side of Lodge Creek. The Applicant's son,
2 who will actually be running the operation, stated that he has had
3 previous experience in this type of operation and feels that he has the
4 necessary equipment to prepare the system with little or no outside
5 help, beyond possibly hiring extra hands to run some of the earth moving
6 equipment. The Applicant does not own the pump which is to be used if
7 this permit is granted. The Applicant plans to use one (1) irrigation
8 when the water is available and expects to get one (1) to two (2) cuttings
9 of alfalfa from each irrigation. Junior Woronik stated that the spring
10 runoff generally lasts one (1) week.

11 10. Waldo Spangelo, Counsel for the Applicant, discussed Exhibit
12 A-2 which is a summary of the previous 14 years streamflow records from
13 the U.S.G.S. gauging station on Lodge Creek at the International Boundary.
14 The data covers the period from 1965 to 1978, inclusive, for the months
15 of March, April and May. During that period, 11 of the 14 years had
16 maximum daily flows in excess of 200 cubic feet per second, and nine (9)
17 of the 14 years had maximum daily flows in excess of 250 cubic feet per
18 second. Mr. Spangelo stated that 200 cubic feet per second was chosen
19 as the flow necessary to satisfy prior rights based on information given
20 in Bob Larson's field report, and also because Creedman Coulee adds to
21 the flow of Lodge Creek below the U.S.G.S. gauge and the Objector, Frank
22 Pleskac, but above several other prior appropriators on Lodge Creek.
23 Ted Thompson, Counsel for the Objector, objected to the fact that Waldo
24 Spangelo, Counsel for the Applicant, had stated that some water must
25 enter Lodge Creek from Creedman Coulee without actually proving such.
26 (NOTE: However, the map which was entered by the Objector as Exhibit O-
27 10 displays Creedman Coulee as a perennial stream.)

28 11. Arlin Krogstad, Department Hearing Representative, stated that
it would take 21 days of pumping at 300 gallons per minute to appropriate
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1 28 acre-feet of water.

2 12. Bob Larson, Havre Water Right Bureau Field Office Manager,
3 made several clarifications for the record. First, at the time of
4 Dorothy Woronik's Application, Bob worked for the Soil Conservation
5 Service, not the Department of Natural Resources and Conservation.
6 Second, in his report regarding appropriations on Lodge Creek, he stated
7 that 200 to 225 cubic feet per second should be sufficient to satisfy
8 existing and working appropriations on Lodge Creek. Mr. Larson defined
9 working appropriations as those which are currently being put to the
10 beneficial use and also are pertinent to the time period when the Applicant
11 seeks to appropriate water. Mr. Larson discussed several large recorded
12 appropriations from Lodge Creek which are not currently being put to
13 beneficial use as examples of appropriations which were not considered
14 to be working appropriations.

15 13. Ted Thompson, Counsel for the Objector, discussed Objector's
16 Exhibits O-8 and O-9. These Exhibits are bar graphs of U.S.G.S. streamflow
17 records at the International Boundary. Based on the information displayed
18 in these Exhibits the Objector claims that there are no unappropriated
19 waters available for the Applicant during the time periods when the
20 Applicant wishes to appropriate such water. A rate of 247.9 cubic feet
21 per second at the U.S.G.S. gauging station was chosen by the Objector as
22 the flow necessary to satisfy prior appropriators before the Applicant
23 should be allowed to appropriate any water. Counsel for the Objector
24 also pointed out that in the Water Resources Surveys for Blaine and Hill
25 Counties, appropriations of more than 1,500 cubic feet per second are
26 listed for Lodge Creek.

27 14. The Objector, Frank Pleskac, testified that he farms south of
28 the Applicant and has appropriated water since 1947 using a 1938 water
right. The right is for 19 cubic feet per second, however, the Objector

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1 has never used the full volume claiming that the water is never available
2 during the irrigation season. Since 1977, the Objector has irrigated
3 45 acres with a sprinkler system. The Objector applies approximately
4 600 to 625 gallons per minute with a sprinkler system. The Objector
5 stated that in 1977, the year he put the sprinkler system in, he was not
6 able to actually run the system because of a shortage of water. The
7 Objector claimed the junior appropriators north of him on Lodge Creek
8 were taking his water. The Objector stated that during spring runoff it
9 is difficult for him to take water out of the creek using his current
10 system. The Objector also stated that if other permit holders followed
11 the stipulations on their permits, he would have sufficient water. The
12 Objector generally begins pumping at the end of April each year, if
13 water is available. To run his existing system efficiently, the Objector
14 appropriates 650 gallons per minute or 1.45 cubic feet per second. The
15 Objector stated that he needed a water depth of 2 1/2 to 3 feet in the
16 creek or a minimum flow of five (5) cubic feet per second for his system
17 to work. Prior to 1977, the Objector irrigated 55 to 60 acres with a
18 flood irrigation system. The maximum diversion ever used by the Objector
19 was approximately 7.1 cubic feet per second. Mr. Pleskac claimed that
20 his pumping system is more efficient when a small volume of water is
21 available than the system proposed by the Applicant. Mr. Pleskac also
22 stated that a large volume of water passes his point of diversion in
23 the months of March and April. He stated that large volumes of water
24 are seldom available in May and occasionally such volumes of water are
25 available in February.

26 15. Bob Larson stood on his report present in the file on this
27 matter, with a special note that he used 27 years of record rather than
28 17 years of record as was used by the Objector in determining water

1 availability. Mr. Larson testified that from 1952 to 1961, flows in
2 Lodge Creek exceeded 247.9 cubic feet per second during the February
3 through May period in seven (7) of those nine (9) years. Mr. Larson
4 also disagreed with the Objector regarding the availability of water in
5 the month of May, stating that during the month of May there are several
6 peak flows available which the Applicant could put to beneficial use.
7 Mr. Larson stated that he feels that excess water is available during
8 periods when the Applicant has proposed to use this water and that the
9 Applicant should be allowed to use this water with the standard Milk
10 River conditions applied. Regarding the excessive appropriations on
11 Lodge Creek, Mr. Larson pointed out that on the Powder River 70 to 90
12 percent of the listed appropriations bear no relation to what actually
13 exists in the field. Mr. Larson also pointed out that Lodge Creek is
14 not an adjudicated stream.

15
16 PROPOSED FINDINGS OF FACT

17 1. That during most years there are unappropriated waters in Lodge
18 Creek during the period from February 1 to May 30.

19 2. That unappropriated waters may be appropriated without adversely
20 affecting prior rights if the Permit is conditioned with the standard
21 Milk River conditions.

22 3. That the Applicant's proposed means of diversion and construction
23 are adequate.

24 4. That the Applicant will be appropriating less than 15 cubic
25 feet per second of water provided that Provisional Permit Nos. 18,516-
26 s40J and 18,519-s40J are not exercised simultaneously.

27 PROPOSED CONCLUSIONS OF LAW

28 1. Under Section 85-2-311, MCA, 1979, "The department shall issue

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1 a permit if:

- 2 1. there are unappropriated waters in the source of supply:
- 3 a. at times when the water can be put to the use proposed
- 4 by the applicant;
- 5 b. in the amount the applicant seek to appropriate; and
- 6 c. throughout the period during which the applicant
- 7 seeks to appropriate, the amount requested is available;
- 8 2. the rights of a prior appropriator will not be adversely
- 9 affected;
- 10 3. the proposed means of diversion or construction are adequate;
- 11 4. the proposed use of water is a beneficial use;
- 12 5. the proposed use will not interfere unreasonably with
- 13 other planned uses or developments for which a permit has
- 14 been issued or for which water has been reserved; . . ."

15 2. It is concluded that there are unappropriated waters in the

16 source of supply at times when the water can be put to the use proposed

17 by the Applicant, in the amount the Applicant seeks to appropriate, and

18 throughout the period during which the Applicant seeks to appropriate,

19 the amount requested is available.

20 3. It is concluded that the rights of prior appropriators will not

21 be adversely affected by the granting of this Provisional Permit.

22 4. It is concluded that the proposed means of diversion or construction

23 are adequate; the proposed use of water is a beneficial use; and the

24 proposed use will not interfere unreasonably with other planned uses or

25 developments for which water has been reserved.

26 Based on the above Proposed Findings of Fact and the Proposed

27 Conclusions of Law the following Proposed Order is hereby made:

PROPOSED ORDER

1. Subject to the conditions and limitations listed below, Provisional Permit No. 18,518-s40J by Dorothy Woronik is hereby granted to appropriate 300 gallons per minute of water, not to exceed 28 acre-feet per annum from Lodge Creek a tributary of the Milk River for irrigation purposes from February 1 to May 30, inclusive, of each year, in Hill County, Montana, to be diverted by means of a pump at points in the NW1/4 NW1/4 NW1/4 of Section 21 and in the NE1/4 NE1/4 NE1/4 of Section 20, and to be used for new flood irrigation on 14 acres in the NW1/4 of Section 21 and 5 acres in the NE1/4 of Section 20, all in Township 37 North, Range 16 East, M.P.M., and containing a total of 19 acres, more or less.

2. The conditions to the issuance of this Provisional Permit are as follows:

- a. Subject to all prior water rights.
- b. Subject to any final determination of existing water rights as provided by Montana law.
- c. The water appropriated pursuant to this Permit shall only be diverted during extremely high spring runoff or when the Water and Power Resources Service (Bureau of Reclamation) is spilling at Vandailia Diversion Dam. During all other periods the Permittee shall allow the normal flow to pass her diversion to satisfy prior water rights.
- d. the Permittee shall contact the Water and Power Resources Service (Bureau of Reclamation) at Malta at the start of each irrigation season to determine the current water supply conditions and the availability of water for her use. This contact shall be made by certified mail through the U.S. Postal Service with return receipt requested.

1 e. The conditions contained herein relating to the Vandalia
2 Diversion Dam under "c" and "d" above may be modified by
3 the Department upon receipt of further evidence or
4 determination by the Department pertaining to water
5 rights of the U.S. Government and said reservoir.

6 f. The Permittee shall install and maintain an adequate
7 measuring device to enable the Permittee to keep a record
8 of rate and volume of water diverted as well as the
9 periods of diversion. Such records shall be presented to
10 the Department of Natural Resources and Conservation upon
11 demand by the Department.

12 3. The granting of Provisional Permit No. 18,518-s40J by the
13 Department in no way reduces or alters the Permittee's liability for
14 damage caused by the Permittee's exercise of said Permit, nor does the
15 Department in issuing the Permit acknowledge liability for damage caused
16 by the Permittee's exercise of this Permit.

17 4. The granting of this Provisional Permit in no way grants the
18 Permittee any right to violate rights of any other party nor does it
19 excuse the Permittee from any liability for same even if such violation
20 is a necessary and unavoidable consequence of exercising this Permit.

21
22 NOTICE

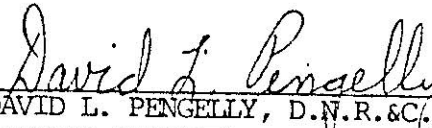
23 This Proposed Order is offered for the review and comment of all
24 parties of record. The review and comment period shall commence with
25 the mailing of this Proposed Order and shall end fifteen (15) days
26 thereafter. No extensions of time for comment will be granted.

27 The Final Order in this matter will be sent to all parties by
28 certified mail.

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1 The Hearing Examiner's Final Order may be appealed in accordance
2 with the Montana Administrative Procedures Act, by filing a petition in
3 the appropriate court within thirty (30) days after service of the Final
4 Order.

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6 DATED this 19th day of February, 1980.

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9 DAVID L. PENGELLY, D.N.R.&C.
10 HEARING EXAMINER
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